IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CRI.WRIT PETITION NO. 208 of 1997

Shri Shivaji Appa Pawar ..Petitioenr

V/s

1. Pushpa Shivaji Pawar

2.Amar Shivaji Pawar

3.State of Maharashtra .. Respondents

Shri Anil A. Anturkar for Petitioner

Shri Vijay Patil for Respondent nos.1 and 2

CORAM:S.R.SATHE,J.

DATED: 25th Aug.2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the Court of the Additional Sessions Judge, Satara in Criminal Revision Petition No.201 of 1995 whereby the order passed by the Court of the Judicial Magistrate, First Class, Phaltan dated 27th July 1995 in Criminal Misc. Application No.34 of 1990 directing the Petitioner husband to pay

maintenance of Rs.250/- per month to wife and rs.150/- per month to child was confirmed and revision petition was dismissed, the husband Petitioner has filed this Criminal writ petition and prayed that the application for maintenance filed by the wife be dismissed.

2. For the sake of convenience hereinafter the parties shall be referred to as the Petitioner husband and Respondent wife.

3. Brief facts giving rise to this writ petition are as under :

. The marriage between Petitioner and Respondent took place on 1-4-1989. After marriage Respondent wife started residing with Petitioner husband at Hol Cirle, Taluka Pahltan, District Satara. For initial few days she was treated well but thereafter husband started harassing her. Whenever he used to go from Mumbai to no.1 he used to ill-treat her. According to Respondent wife when she was pregnant, the Petitioner drove her out of the house and she was constrained to stay with her parents' house. Thereafter on 25-10-1989 she delivered a male child. However, neither the Petitioner nor his parents came to see the

Respondent and newly born child. Respondent's parents also requested the Petitioner to take his wife with him. However, he refused. The Respondent wife therefore issued notice dated 28-12-1989 to the Petitioner husband and called upon him to take her with him. The Petitioner husband replied the said notice and denied the paternity of the child (original applicant no.2). Naturally, the Respondent wife was shocked to see the attitude of the Petitioner husband. Finding that Petitioner husband was not ready and willing to maintain her, she filed Criminal Misc. Application NO.34 of 1990 under Section 125 of Cr.P.C. and claimed maintenance of Rs.500/- p.m. for herself and Rs.200/- per month for child i.e. original applicant no.2.

4. The Petitioner husband filed his say Exh.9 and admitted the relationship with Respondent but contended that he had never any sexual intercourse with Respondent wife and so denied the paternity of the child. He also contended that as he had filed petition under Section 12(i)(d) of Hindu Marriage Act, the wife filed application under Section 125 of Cr.P.C.. According to him there was absolutely no reason for her to claim any maintenance. He also contended that he is not in a financial

position to pay maintenance as prayed. Hence on all these grounds the Petitioner husband prayed for dismissal of the application.

5. After considering the evidence adduced by both the parties the learned Judicial Magistrate, F.C., came to the conclusion that the Petitioner is the father of the child and the Respondent wife is unable to maintain herself. He also held that the Petitioner husband refused and neglected to maintain the Respondent wife. He therefore directed the Petitioner husband to pay maintenance of Rs.250/- per month to wife and Rs.150/- p.m. to son.

6. Being aggrieved by this order the Petitioner husband filed Revision Application No.201 of 1995 in the Court of the Additional Sessions Judge, Satara. After hearing arguments of both the learned Advocates the Additional Sessions Judge came to the conclusion that the Petitioner husband is the father of applicant no.2 and he has refused and neglected to maintain his wife i.e. present Respondent. He therefore, confirmed the order passed by the learned Judicial Magistrate, F.C..

7. It is this order that is being challenged in

this Criminal Writ Petition.

8. In this petition before me learned Advocate for the Petitioner has urged two points. Firstly, he submitted that there is sufficient material on record to show that Respondent wife was in fact pregnant at the time of her marriage with Petitioner and applicant no.2 is not begotten from him and under such circumstances the Petitioner husband is not liable to pay any maintenance.

9. As against this the learned Advocate for the Respondent wife supported the judgment and order passed by the Court of Additional Sessions Judge, Satara and submitted that Criminal writ petition be dismissed.

. It is not in dispute that marriage between Petitioner and Respondent was solemnized on 1-4-1989 and thereafter respondent started residing in the house of Petitioner and on 3-4-1989 there was Satyanarayan Puja at the residence of petitioner. It is also an admitted fact that since prior to the marriage appellant was serving at Mumbai and respondent never went along with petitioner to Mumbai. Admittedly, there was no sexual inter course between the petitioner and

respondent prior to marriage or after marriage till 3-4-1989. Of course, it is the case of respondent wife that petitioner had intercourse with her after her menstruation period was over on 8-4-1989 and thereafter for about 10/12 days. However, the petitioner has alleged that there was no such intercourse and he had gone to Mumbai 4/5 days after the marriage. It is also admitted that on 25-10-1989 the respondent gave birth to a male child in Hospital of Dr.Sneha Sidhaye at Phaltan and it was not normal delivery but she had to undergo scisrorian. It is very clear that within 6 months 25 days the respondent wife has given birth to a male child. According to respondent the first sexual intercourse had taken place on 8-4-1989 so the child was born after 199 days from the first intercourse with appellant. So the petitioner has denied the paternity of the said child and contended that respondent was in fact pregnant form some other person than the petitioner when his marriage with respondent took place. In order to succeed in getting a decree under Section 12(1)(d) the appellant has to prove that respondent was at the time of marriage pregnant from some person other than the petitioner. So, we have to find out what evidence has been adduced by the petitioner while relying on the provisions of Section 112 of

Indian Evidence Act 1872 which runs as follows :-

> 112. Birth during marriage, conclusive proof of legitimacy - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when it could have been begotten.

10. It is an admitted fact that child in question was born during the continuation of a valid marriage between his mother and petitioner and as such it has to be presumed that the said child is legitimate child of petitioner. If petitioner wants to challenge the paternity of the said child then he must prove that he and respondent had no access to each other at any time, when the child in question could have been begotten. So, I think that entire fate of this petition depends on the point as to when child in question has begotten.

11. In order to point out the period when child

was begotten, the petitioner has examined Dr.Sneha Sidhaye, in whose hospital, scissorian operation of respondent took place and she gave birth to a male child. Dr. Sidhaye has stated that delivery of respondent was not premature and child was of fully matured period of 9 months. If it is so, then obviously one will have to say that the said child is not from the petitioner. Because, admittedly the parties had no sexual intercourse with each other prior to their marriage which took place on 1-4-1989. As against this, it is the contention of the respondent that it was her premature delivery and it was not fully matured child but fetus was at the most of 199 days. If it is so, then of course relying on provisions of section 112 of Indian Evidence Act it has to be said that it is legitimate child of the petitioner. In fact the trial Court has held that child in question was of matured period while appellate Court held that there was no sufficient evidence to show that child was of matured period. Dr.Sneha Sidhaye has produced the case papers of respondent wherein it is mentioned that fetus was of 36 weeks. However, if we see the entire deposition of witness Dr.Sneha Sidheye Exh. 2 and the case papers, the weight of child is written as "2 Kg.." In fact it appears that there is some over writing in the figure "2".

Initial figure must have been "1", thereby justifying that it was premature delivery. The question arises as to whether a child of 199 days can survive. When attention of Dr.Sneha Sidhaye was drawn to some propositions laid down in Modi's Medical Jurisprudence and Toxicology, it seems that she has admitted that even a child born after period of 174 days pregnancy can also survive. In the instant case merely because the child has survived we cannot jump to the conclusion that the child was of matured period. In Modi's Medical Jurisprudence some instances are quoted wherein child of even 26 weeks of pregnancy had survived. From evidence of Dr.Sneha Sidhaye it is very clear that she had never examined respondent prior to time she was admitted in her hospital for delivery. In fact for that matter the respondent has not adduced any evidence to show that she was examined by any other doctor. Nor the respondent has stated in her evidence that she was examined by any particular doctor from time to time. If such evidence would have been available then it was easy to detect the period of pregnancy. It is needless to say that as per medical science -- the age of foetus can be determined from its length, weight and other characteristics. There are some other factors such as whether the child cried immediately

after the birth to determine the duration of fetus. However, in the instant case we find that Dr.Sneha Sidhaye has not at all examined the child, she has not uttered a single word about all these factors. So one does not know on what basis it has been mentioned in the case paper that fetus was of 36 weeks. So, the Additional Sessions Judge has rightly held that evidence of Dr.Sneha Sidhaye was not at all sufficient to prove that child in question was of full matured period or that fetus was of 36 weeks. Naturally it can not be held that respondent was pregnant on the date of her marriage with petitioner.

12. There are various circumstances on record which would also indicate that child in question was not of full maturity period. The conduct of parties would also go to show that in all probabilities the child in question was not of full maturity period and it was in fact premature delivery wherein the pregnancy period was hardly 190/199 days. It is the case of the petitioner that it is only after the time he was informed by his friend on 30-10-1989 that respondent has given birth to a male child he came to know about the child and in fact about the respondent’s pregnancy. If really the child would have been of full

maturity period i.e. of 36 weeks then obviously it can be said that there was every possibility for the appellant to know about the pregnancy when he met the respondent at the time of marriage or atleast at the time when he had been to the house of respondent's parents in the month of June, July and August. Not only that but if at the time of marriage respondent would have been pregnant then even the other family members of petitioner would have come to know about the respondent's pregnancy. But that has not happened. That is obviously because at the time of marriage she was not pregnant.

13. The respondent has stated in her deposition at Exh.45 that she was not pregnant at the time of her marriage. She had sexual intercourse for the first time with appellant on 8-4-1989 and thereafter for about 10/12 days. Though the petitioner has contended that he went to Mumbai 4/5 days after marriage he has not adduced any specific evidence in that behalf. Nor he has given the exact date on which he left his house. It is very difficult to believe that petitioner had no sexual intercourse with respondent even after her menstruation period was over. In fact as per provisions of Section 112 of Indian Evidence Act it is not necessary to prove

the sexual intercourse during relevant period. Access and non access means the existence or non existence of opportunities for sexual intercourse and it does not amount to actual cohabitation. So, when marriage had taken place on 1-4-1989, Santyanaraya puja was performed on 3-4-1989 and thereafter for few days the appellant and respondent had stayed together, it must be said that there was an opportunity for sexual intercourse and as such the petitioner had access contemplated under Section 112 of Indian Evidence Act. Admittedly in the month of June, July and August 1989 the appellant had gone to the house of respondent so it is very difficult to believe that at that time he had no knowledge about the pregnancy of the respondent or that during that period, respondent had tried to conceal her pregnancy. Then we find that brother of the respondent had specifically written letter to the appellant that respondent is in need of money to meet the medical expenses and petitioner had accordingly paid the amount. It is difficult to believe that he had not come to know the illness of respondent or for what purpose the medical help was required. If the petitioner had suspicion to the effect that respondent was concealing something from him then he would have insisted the respondent

and taken her to doctor. But that has not happened. This in fact suggests that petitioner had also an idea about the pregnancy of the respondent. So, merely because in the letters which were written by the brother of the respondent to petitioner it was not specifically mentioned that respondent was pregnant it cannot be said that respondent and her brothers wanted to conceal the fact of pregnancy of the respondent. Looking to the conduct of the petitioner one has to say that the petitioner must be having an idea about the respondent's pregnancy and that is why the brother also did not feel it necessary to specifically mention in the letter about the respondent's pregnancy. Non mention of pregnancy in the said letters will certainly not help the petitioner to prove his case.

14. There is yet another circumstance which also shows that respondent must not be pregnant at the time of marriage and there was nothing suspicious when she gave birth to a child. We find that even after the time the petitioner was informed about the delivery of respondent which had taken place within 200 days from the marriage, he did not take any action against the respondent immediately. On the contrary, we find that it was respondent who

first issued notice to the petitioner and asked him to maintain her. It is only thereafter the petitioner filed present petition for annulment of the marriage on the grounds mentioned in section 12(a)(d) of the Hindu Marriage Act. If really the appellant had any doubt about respondent's chastity and there was no sexual intercourse with respondent at any time he would have definitely made a grievance to respondent's parents about respondent giving birth to a child and taken some legal action against respondent. But we find that he kept mum for a long period. So, this inaction on his part also indicates that there is no sustenance in the contention of the petitioner.

15. It was argued on behalf of the petitioner that the blood group of the appellant is B-RH positive, respondent's blood group is B-RH positive while blood group of child in question is AB positive. As per evidence of Dr.Gaikwad and his report Exh.74 there is no chance of a child having AB Rh positive group when the parents are of BRH positive group. So, relying on this it was argued that child in question was not of appellant. However, it must be noted that it is well settled that blood group test is not a conclusive test and merely on the blood group examination one cannot positively decide the

question of paternity. The evidence of Dr.Gaikwad is not accepted by the Additional Sessions Judge as the same is not convincing. Merely from that test one cannot conclusively say that petitioner must not be the father of Amar. In fact Dr.Gaikwad had suggested DNA test and the respondent had even shown the willingness to undergo the test but the same could not be carried out. Thus we find that the Additional Sessions Judge after carefully scrutinising the entire evidence and considering the position of law observed that the petitioner has failed to adduce cogent evidence to prove that he had no access to the respondent during the period when the child could have begotten and consequently failed to prove that at the time of marriage respondent was pregnant from some other person than the petitioner. There is no reason to interfere with the said finding of the Additional Sessions Judge.

16. Thus it is very clear that the order passed by the Court of the Additional Sessions Judge, Satara is legal and correct. there is no necessity to interfere with the same. Hence the writ petition is dismissed and the Petitioner is directed to pay cost of Rs.500/- to the Respondent wife.

17. Certified copy expedited.

( S.R.SATHE,J.)